# University of Pennsylvania Law Review

## And American Law Register

FOUNDED 1852

Published Quarterly, November to June, by the University of Pennsylvania Law School, at 34th and Chestnut Streets, Philadelphia, Pa.

$2.50 PER ANNUM; FOREIGN, $3.00; SINGLE COPIES, 65 CENTS.



## NOTES.

ILLEGALITY OF UNIFORM RESALE PRICE MAINTENANCE UNDER FEDERAL TRADE COMMISSION ACT.—With the advent of national advertising by manufacturers and producers the question of resale price maintenance has become one of considerable importance. The problem is a comparatively recent one. It has only become a problem since the establishment by national advertising of so-called "national brands." Can a manufacturer by any lawful means control the resale prices of his goods so as to secure uniform resale prices? It should be noted that the question is not one as regards

*The Board of Editors regrets the resignation of Thomas McConnell, III, an Associate Editor, on account of illness.

the control of prices by a monopoly control of the production of a certain commodity. It concerns merely the price maintenance of a certain brand of goods of a particular commodity by the individual producer in a competitive field.[1] In a recent case the question was again presented to the Supreme Court of the United States for consideration.[2] The Beech-Nut Packing Company set certain uniform prices for the sale of its products by both wholesalers and retailers. These prices were maintained by co-operation and common understanding, but without any express agreement or contract. The penalty of non-compliance with the prices was an inability to secure from any jobber or from the Company itself any more of its products. The Company maintained a very effective system of surveillance to secure a compliance with these resale prices. The result was that the Beech-Nut Packing Company actually controlled and dictated the resale prices of its products. The Federal Trade Commission, by virtue of the authority given it by Congress,[3] sought an injunction to restrain the defendant company from any further enforcement of this system. The Circuit Court of Appeals of the Second Circuit refused an injunction.[4] On appeal, by a five to four decision, the Supreme Court reversed the lower court and held in effect that this system violated The Federal Trade Commission Act [5] in that it tended to hinder and stifle competition and was as a consequence "unfair competition."

In 1908, in the case of Bobbs-Merrill Co. v. Strauss,[6] the Supreme Court for the first time questioned the right of a producer to control resale prices. The publishers of a copyrighted book printed in each book a condition of sale, which provided that it could be resold only at a stipulated price, and that any violation of the condition would be an infringement of the copyright. The court held that such condition was ineffectual in the absence of any contract or license agreement, and did not constitute an infringement

[1] For example, the question is not where A has a monopoly of shoes and controls the price through his monopoly of supply. The question is one where A, B, and C manufacture shoes in competition with one another. Can A dictate the resale price at which his particular make of shoes will be resold?

[2] Federal Trade Commission v. Beech-Nut Packing Co., 42 Sup. Ct. 150 (1922).

[3] 38 Stat. at Large, ch. 311, sec. 5. "The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce."

[4] Beech-Nut Packing Co. v. Federal Trade Commission, 264 Fed. 885 (C. C. A. 1920).

[5] Note 3, *supra.*

[6] 210 U. S. 339, 52 L. Ed. 1086 (1908). Accord: Waltham Watch Co. v. Keene, 202 Fed. 225 (D. C. 1913).

of the complainant's copyright. In Bauer v. O'Donnell [7] the same rule was laid down in regard to patented articles. In this case the manufacturer had attached to the article a license to sell only at a fixed price. The court held that a subsequent retail "cut price" sale did not violate any of the complainant's rights under the patent laws and that the notice was in no way binding upon the retailer. It will thus be seen that the attachment of a "license" to sell only at a stipulated price is ineffective, both as to copyrighted and patented articles, to secure uniform resale prices.

Such being the case, can the manufacturer secure uniform resale prices by means of express contracts and agreements? In Miles Medical Co. v. Park & Sons Co.,[8] the legality of such contracts was squarely presented to the court for decision. The Supreme Court held that these contracts violated the Sherman Act [9] in that they constituted a restraint of trade. Such contracts, says the court in another case,[10] constitute an effort to "destroy the dealer's independent discretion through restrictive agreements."

A later case, U. S. v. Colgate & Co.,[11] threw considerable doubt upon the question. The defendant was indicted for violation of the Sherman Act.[12] It was alleged that if a dealer did not sell the defendant's goods at the price fixed by it, the defendant would not resell to that dealer. The dealer was free to cut prices on the goods he had, but the penalty was a failure to secure any more goods from the defendant. The court held that the indictment did not charge

[7] 229 U. S. 1, 57 L. Ed. 1041 (1913). Previous to this decision as a result of Bement v. National Harrow Co., 186 U. S. 70, 46 L. Ed. 1058 (1902), the lower Federal courts had held that the "license" was effective in the case of patented articles. Victor Talking Machine Co. v. The Fair, 123 Fed. 424 (C. C. 1903); National Phonograph Co. v. Schlegel, 128 Fed. 733 (C. C. 1904); Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co., 154 Fed. 358 (C. C. 1907); Automatic Pencil Sharpener Co. v. Goldsmith Bros., 190 Fed. 205 (C. C. 1911).

[8] 220 U. S. 373, 55 L. Ed. 502 (1911). In this case the retailers were compelled to sign a contract agreeing to sell the goods only at the price fixed by the complainant. The signing of the contract was made a condition precedent to the ability to secure any of the complainant's goods.

Prior to the Miles Co. case, the legality of these contracts had been passed upon by the Circuit Court of Appeals of the Sixth Circuit. Park & Sons Co. v. Hartmen, 153 Fed. 23 (C. C. 1907). The court held the contracts illegal. To quote in part from that opinion, "All room for competition between retailers, who supply the public, is made impossible. If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the product marketed by complainant, it is not discoverable. Thus a combination between the manufacturer, the wholesalers and the retailers to maintain prices and stifle competition has been brought about."

[9] Act of July 2, 1890, c. 647, 26 Stat. 209.

[10] U. S. v. A. Schrader's Son, Inc., 252 U. S. 85 (1920).

[11] 250 U. S. 300, 63 L. Ed. 992 (1919).

[12] Note 9, *supra*.

the defendant with any violation of the Sherman Act.[13] This decision was construed by a lower court [14] as holding that a manufacturer could enforce uniform resale prices so long as there was no express agreement and that the rule of Miles Medical Co. v. Park & Sons [15] applied only to express agreements and contracts. On appeal [16] the Supreme Court repudiated any such interpretation of U. S. v. Colgate & Co.[17] The only question decided was one of pleadings, in view of the interpretation put upon the indictment by the lower court. The question of implied agreements, it said, was in no way brought up or touched upon. The Miles Co. case [18] was not intended to be modified in any manner. The question, therefore, of "implied agreements" and "tacit understandings" was still undetermined. This question was presented for consideration in the principal case.

Can the manufacturer secure the result of uniform resale prices through "tacit understanding" and "mutual co-operation," which the Miles Co. case [19] had prohibited in the case of express agreements? The court answers the question in the negative. It is the effort to fix prices that is illegal. The means are not the determining factor. It is the policy of "price fixing" and price maintenance that the law condemns and prohibits. It is the policy of the law to prohibit price maintenance by a manufacturer, and any means adopted to secure that result is equally ineffective.

It is submitted that the underlying basis of the entire question of price maintenance is an economic one, one of public policy. The Sherman Act [20] prohibits agreements in restraint of trade. The Federal Trade Commission Act [21] authorizes the prevention of "unfair competition." These acts are fundamentally statements of public policy. That public policy and interest the court has construed as being the right to have every sale transaction of any char-

[13] Note 9, *supra.*

[14] U. S. v. A. Schrader's Sons Inc., 264 Fed. 175 (D. C. 1919). It is interesting to note that the lower court in the principal case put exactly the same interpretation upon the Colgate case. See Beech-Nut Packing Co. v. Federal Trade Commission, 264 Fed. 885 (C. C. 1920).

[15] Note 8, *supra.*

[16] Note 10, *supra.* In referring to the Colgate case the court said, "We had no intention to overrule or modify the doctrine of Dr. Miles Medical Co. v. Park & Sons, where the effort was to destroy the dealers' independent discretions through restrictive agreements. Under the interpretation adopted by the trial court and necessarily accepted by us, the indictment failed to charge that Colgate & Company made agreements, either express or implied, which undertook to obligate vendees to observe specified resale prices."

[17] Note 11, *supra.*

[18] Note 8, *supra.*

[19] Note 8, *supra.*

[20] Note 9, *supra.*

[21] Note 3, *supra.*

acter free from all elements of control as far as price maintenance is concerned so that the public may secure the benefits of unrestricted competition. As Mr. Justice Hughes says, "Because there is monopoly of production, it certainly cannot be said that there is no public interest in maintaining freedom of trade with respect to future sales after the article has been plcaed on the market and the producer has parted with his title." [22] The controlling public interest is to have unrestricted competition, free from all price control.

In the Miles Medical Co. case, [23] Mr. Justice Holmes, in his dissent, questioned the proposition that public interest demanded the elimination of price maintenance and uniform resale prices. To quote, "I think that we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article, as fixing a fair price. What really fixes that is the competition of conflicting desires. . . . As soon as the price of something that we want goes above the point at which we are willing to give up other things to have that, we cease to buy it and buy something else. . . . I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get." [24] This fairly represents the position of the advocates of price maintenance. The manufacturer's interest does follow the article to the ultimate customer. It is to his interest to see that the retailer secures a fair profit so that he will continue to handle the article. It is to protect the manufacturer from the consequences of price cutting by retailers that price maintenance is sought.[25] The legality of all uniform resale price agreements should be their reasonableness. In England [26] and in some states [27] this view of the question has been taken and price maintenance upheld.[28]

[22] Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, at page 403.

[23] Note 8, *supra*.

[24] 220 U. S. 373 (1911), at page 412.

[25] See an article by Mr. Justice Brandeis, then a member of the bar, in *Harper's Weekly* for November 15, 1913, entitled "Cut-throat Prices—The Competition That Kills."

[26] Elliman Sons & Co. v. Carrington & Sons [1901] 2 Ch. Div. 275; National Phonograph Co. v. Edison-Bell Co. [1908] 1 Ch. Div. 335; Ford Motor Co. v. Armstrong, 30 Times Law R. 400 (1914); Dunlop Tyre Co. v. New Garage Co. [1915] A. C. 79.

[27] Ghirardelli Co. v. Hunsicker, 164 Cal. 355, 128 Pac. 1041 (1912); Fisher Flour Milling Co. v. Swanson, 76 Wash. 649, 137 Pac. 144 (1913).

[28] For two very able articles advocating this view *see:* "The Maintenance of Uniform Resale Prices" by Charles L. Miller, 63 U. of P. Law Rev. 22; "Predatory Price Cutting as Unfair Trade," by Edward S. Rogers, 27 Har. Law Rev. 139.

It will be noticed that the Federal Trade Commission is empowered to prevent "unfair competition." [29] And it is upon the theory that the price maintenance plan of the Beech-Nut Packing Co. constituted "unfair competition," that it was held illegal in the principal case. The minority of the court denied that there was any question of competition at all involved.[30] The majority of the court held, however, in substance that fair competition meant unrestricted competition and therefore any hindrance of such competition was "unfair competition" within the meaning of the Act.

As a result of the Beech-Nut Packing Co. case [31] it would seem that the Supreme Court would hold all forms of contracts, agreements or arrangements, having for their object the regulation and maintenance of uniform resale prices illegal and unenforceable.

*P. A. M.*

INTOXICATING LIQUOR AS A SUBJECT OF LARCENY UNDER THE VOLSTEAD ACT.—It must be admitted that "prohibition" has not met with the unanimous approval of the people of the United States, but that, on the other hand, there is a certain element of lawlessness present, as evidenced by numerous newspaper accounts of daring raids and housebreakings for the purpose of illegally carrying away intoxicating liquors. It is much to be desired that the criminal liability for such offenses should be definitely fixed.

It has been decided in a recent case [1] that intoxicating liquor manufactured since January 20, 1921, for beverage purposes, is not the subject of larceny. The theory upon which the court seems to proceed is that under the Volstead Act [2] intoxicating liquors manufactured in violation of law are not property [3] and, hence, are not to be protected as such.

[29] Note 3. *supra.*

[30] Mr. Justice Holmes delivered a dissenting opinion, concurred in by Mr. Justice McKenna and Mr. Justice Brandeis. Mr. Justice McReynolds delivered a separate dissenting opinion. To quote from Mr. Justice Holmes' opinion. "The ground on which the respondent is held guilty is that its conduct has a dangerous tendency, unduly to hinder competition or to create monopoly. It is enough to say that this I cannot understand. . . . I cannot see how it is unfair competition to say to those to whom the respondent sells and to the world you can have my goods only on the terms that I propose when the existence of any competition in dealing with them depends upon the respondent's [Packing Company's] will. I see no wrong in so doing, and if I did I should not think it a wrong within the possible scope of the word unfair. Many unfair devices have been exposed in suits under the Sherman Act, but to whom the respondent's conduct is unfair, I do not understand."

[31] Note 2, *supra.*

[1] People v. Spencer, 201 Pac. 130 (Cal. 1921).

[2] National Prohibition Act (41 Stat. 305).

[3] Title II, Sec. 25, reads in part as follows: "It shall be unlawful to have